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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THALIA KELLY CONSIDINE

and

CHARLES RAY CONSIDINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether the opinion and decision of the Court of Claims herein conflicts with this Court's opinion respecting collateral estoppel in Yates v. United States, 354 U.S. 298 (1957), and the Second Circuit's opinion in The Evergreens v. Nunan, 141 F.2d 927 (2nd Cir. 1944), respecting the proper application of the doctrine of collateral estoppel in a federal tax case.

2. Whether under the doctrine of collateral estoppel a citizen convicted of a crime under Section 7206 (1) of the Internal Revenue Code, a statute which does not involve or require proof of intent to evade tax, is collaterally estopped in a civil action requiring proof of intent to evade tax from denying intent to evade tax.

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STATUTES:

26 U.S.C. § 6501(c)(1). . 1,6,8,9,10,11

26 U.S.C. § 6653(b) 1,4,6,9,10

26 U.S.C. § 7206(1) 1,2,4,7,11

28 U.S.C. § 1255(1) 1

MISCELLANEOUS:

10 Mertens, Law of Federal Income Taxation § 57.36 9

Petitioners Thalia Kelly Considine and Charles Ray Considine respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered and filed respectively in this proceeding on March 19, 1982 and March 25, 1982.

OPINION BELOW

The opinion of the Court of Claims (Appendix A) is reported at 645 F.2d 925 (Ct. Cl. 1981).

JURISDICTION

The judgment of the Court of Claims (Appendix B) was dated and entered on March 19, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255 (1).

STATUTORY PROVISIONS INVOLVED

The applicable portions of 26 U.S.C. § 6501 (c) (1), § 6653 (b) and § 7206 (1)

are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner Charles Ray Considine, a resident of California, was indicted under § 7206 (1) of the Internal Revenue Code, the felony perjury statute, for filing false statements on his joint 1966 and 1967 federal income tax returns. Section 7206 (1) provides in relevant part:

> "Any person who--
> (1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guility of a felony * * *."

The false statements petitioner Charles Ray Considine was charged with making for 1966 were reporting interest income of $23,811 "whereas he then and there well knew and believed, the correct reportable interest income was in the amount of

$33,786," and claiming a charitable contribution to a boy's school in the amount of $20,781.31 "whereas, as he then and there well knew and believed that he was not entitled to said deduction in any amount."* The false statement for 1967 was merely the claiming of a $3,028.21 charitable deduction carryover from 1966 resulting from the foregoing $20,281.31 claimed in 1966.

Prior to the criminal trial, petitioner Charles Ray Considine, as did the defendant in United States v. Anderson, 254 F. Supp. 177, 183-85 (W.D. Ark. 1966), moved for a bill of particulars concerning facts relating to the element of intent to evade tax. As was the defendant in Anderson, 254 F. Supp. at 183-85, petitioner was concerned that "in the event

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* Indictment of May 4, 1972, Count Two.

of an adverse decision or conviction," he would, because of the recent trend of collateral estoppel decisions, "be subjected to the Civil fraud penalties" under § 6653 (b) for intent to evade tax and the opening of the statute of limitations. The Commissioner, as he also did in Anderson, assured the trial court that the criminal perjury case under § 7206 (1) had nothing to do with the element of intent to evade tax, and the district court, as did the trial court in Anderson, sustained the Commissioner's objections, thereby denying petitioner Charles Ray Considine the opportunity to put on evidence denying there was intent to evade tax.

Following conviction of petitioner for 1966 and 1967, the Commissioner asserted § 6653 (b) penalties for intent to evade tax, and, not surprisingly, relied on

collateral estoppel from the criminal perjury convictions to prohibit petitioner Charles Ray Considine from denying that he realized in 1966 an additional $9,975 of interest income and that in 1966 his claimed charitable deduction of $20,781 was limited to $11,904.76.

Since a deficiency in income tax for 1966 results from the addition of $9,975 in "interest" income and reduction of the charitable contribution from $20,781 to $11,904.76 for that year, and a deficiency in income tax for 1967 results from the limitation of the 1966 charitable deduction of $20,781 to $11,904.76 and consequent elimination of the $3,028.21 carryover to 1967, the Commissioner and the Court of Claims have applied collateral estoppel from the criminal perjury case, which the Commissioner and the district courts say does

not involve intent to evade tax in any way, to supply the element of intent to evade tax which is required to apply § 6501 (c)(1)'s provisions opening the statute of limitations and § 6653 (b)'s provisions assessing a 50% civil penalty for intent to evade tax.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With The Collateral Estoppel Decision Of The Supreme Court Of The United States In Yates v. United States, 354 U.S. 298, 338 (1957), And With The Collateral Estoppel Decision Of The Second Circuit In The Evergreens v. Nunan, 141 F.2d 927, 931 (2nd Cir. 1944).

In Yates v. United States, 354 U.S. 298, 338 (1957), this Court, citing approvingly from The Evergreens v. Nunan, 141 F.2d 927, 931 (2nd Cir. 1944), ruled precisely

on the point of whether petitioner Charles Ray Considine is collaterally estopped from denying that in 1966 he realized an additional $9,975 of interest income and overstated a charitable deduction by $8,876.24. It held, 354 U.S. at 338, that the prior § 7206 (1) criminal perjury judgment herein "need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding," and that "so far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." Stated more specifically in the language from The Evergreens, cited by Yates, Judge Learned Hand held:

> ". . .we do not hesitate to hold that, even assuming arguendo that 'mediate data', decided in the first suit, conclusively established facts 'ultimate' in the second, no fact decided in the first, whether 'ultimate' or a 'mediate datum', conclusively

> establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit." 141 F.2d at 930-931.

That is, the determination of two facts in the earlier criminal perjury suit (petitioner Charles Ray Considine had additional interest income of $9,975 and overstated a charitable contribution by $8,876.24) does not establish anything in this civil proceeding, which involves § 6501 (c) (1)'s opening of the statute of limitations if the return is false or fraudulent with the intent to evade tax, unless those two facts are ultimate facts in this proceeding.

Section 6501 (c) (1)'s provision opening the statute of limitations and validating the assessment herein applies only if the return is false or fraudulent with the intent to evade tax, and it is not sufficient that the return be false if there

exists no intent to evade tax.* It is therefore clear that it is not an ultimate issue of fact in a § 6501 (c) (1) case whether the taxpayer did or did not have additional income or did or did not overstate a charitable deduction. Rather, the ultimate issue of fact in determining the issue here of whether the Commissioner is prohibited by § 6501 (c) (1)'s statute of limitations from assessing the § 6653 (b) penalty is simply whether the 1966 and 1967 returns were false or fraudulent with the intent to evade tax. 10 Mertens, Law of Federal Income Taxation § 57.36. That this is the ultimate issue of fact in a § 6501 (c) (1) case is shown by analogy to the ultimate issue of fact in a § 6653 (b) case, which also requires

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* 10 Mertens, Law of Federal Income Taxation § 57.36.

intent to evade tax in addition to a false or fraudulent return. In Amos v. Commissioner, 43 T.C. 50, 55-56 n.6 (1964), the Tax Court held that the application of § 6653 (b) "depends upon a determination of the ultimate fact that petitioner's underpayment of tax for years 1955 through 1958 was due to fraud," and that "a mediate fact within this context would be a fact merely tending to establish an essential element itself." Hence, as pointed out in Judge Chabot's dissenting opinion in Goodwin v. Commissioner, 73 T.C. 215, 246-247 (1979):

> "The willful filing of an income tax return omitting income is a fact which if true may, together with further facts, be a basis from which an intent to evade tax may be inferred. It is not an 'ultimate' fact in a section 6653 (b) proceeding."

That is, under a statute such as § 6501 (c) (1), which requires that a return be false or fraudulent with the intent to

evade tax in order for the Commissioner to avoid the statute of limitations, the fact of additional income or an overstated deduction is not an ultimate fact. Hence, under Yates and The Evergreens, the Court of Claims was not permitted to hold that petitioner Charles Ray Considine is collaterally estopped in a § 6501 (c) (1) case involving the element of intent to evade tax to deny that he had additional interest income of $9,975 and overstated a charitable deduction by $8,876.24, by such findings in a § 7206 (1) case which does not involve intent to evade tax. Or, to put it another was, the Court of Claims lacks the power to overturn a decision of the Supreme Court of the United States by the simple expedient of labeling as an ultimate fact what is obviously a 'mediate' fact. If it can, there was no point in the Supreme Court spending the time and

energy required to decide Yates.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

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June 14, 1982

(APPENDIX A, B AND C IN SEPARATE VOLUME)

CERTIFICATE OF SERVICE

I, W. Lee McLane, Jr., attorney for petitioners and a member of the Bar of this Court, certify that this Petition was served upon respondent's counsel of record by depositing three copies in the United States mail on June 14, 1982, first-class postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served were served.

W. Lee McLane, Jr.